Michael K. Jeanes, Clerk of Court
*** Filed ***
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000163-001 DT 07/08/2011

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
T. Melius
Deputy

GILBERT TOWN CENTER LP

ANDREW M HULL

v.

WILLIAM BELL (001)

MARK A TUCKER

HIGHLAND JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC2010–549606FD

Plaintiff Appellant (Plaintiff) appeals the Highland Justice Court's determination to vacate Plaintiff's default judgment because the 5 day notice was not properly served. Plaintiff contends the trial court erred. For the reasons stated below, this Court reverses the trial court's judgment.

I. FACTUAL BACKGROUND.

On November 8, 2010, Plaintiff prepared a Notice of Intent to Terminate Rental Agreement for Non-Payment of Rent—5 day notice. Although Plaintiff hired a process server to serve/deliver this notice, Defendant was not personally served. Instead, the process server left the document with an unknown red-haired Caucasian man.[1] The 5 day notice is marked as "hand delivered."[2] Defendant was not at home at the time of the alleged service[3] and testified that he had no roommate on the date and time when the document was delivered.[4] Plaintiff did not mail a copy of this notice to Defendant. Defendant found a copy of the notice posted on his door when he returned to his residence on November 9, 2010.[5]

. . . .

[1] Audio Recording of January 19, 2011, hearing, at 11:04.
[2] Notice of Intent to Terminate Rental Agreement for Non-Payment of Rent dated November 8, 2010.
[3] Defendant and his girlfriend Crista Thompson both testified Defendant was at Ms. Thompson's home on the date the process server delivered the document. Audio recording, *id*., at 10:59 and 11:01.
[4] *Id*. at 11:05.
[5] *Id.*, at 11:01.

On November 19, 2010, Plaintiff filed a forcible detainer action for the non-payment of rent. The hearing was set for November 29, 2010. Plaintiff had Defendant served with the Summons and Complaint on November 22, 2010, and service was accomplished by posting a copy of the Summons on the door and mailing a copy by certified mail to the Defendant at his address.[6] Defendant did not appear for the scheduled hearing and Plaintiff was awarded a default judgment.

Defendant filed a Motion to Vacate Judgment claiming Plaintiff never properly served him with the 5 day notice. He gave the trial court an affidavit from his girlfriend—Crista Thompson—stating he was not at his home on November 8, 2010, but, instead, was at her home the entire day. At the January 19, 2011, scheduled hearing on Defendant's Motion to Vacate, Plaintiff's process server—Max Lawler—testified about service/delivery of the 5 day notice.[7] The process server stated he served the document on a red-haired Caucasian man, approximately 40–50 years old. Defendant is a Black man.

At the conclusion of the hearing, the trial court vacated the judgment. The trial court stated:

> The purpose of process is to provide effective notice to defendant. Because of certain inconsistencies in the record and the process server's testimony, the Court, in an abundance of caution for the procedural due process rights of the Defendant, rules in favor of vacating the Default Judgment entered on November 29, 2010.[8]

Plaintiff filed a timely appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. Was Defendant Properly Notified of the 5 Day Notice.

Defendant asserted procedural deficiencies as Plaintiff failed to properly serve the required 5 day notice prior to the Plaintiff filing a forcible detainer action. Although Plaintiff hired a process server to serve Plaintiff, the process server admitted that he did not actually serve Defendant. The process server described the man who actually received the documents as a red-haired Caucasian man answering to the name of William. Defendant is not Caucasian and has black hair. Defendant also testified he did not have a roommate on the date when the documents were served.

Forcible detainer actions are statutory proceedings. As such, and because of the expedited nature of the forcible detainer action, the procedural features of the statutes are integral to their function. *Hinton v. Hotchkiss*, 65 Ariz. 110, 114, 174 P.2d 749, 753 (1946). A.R.S. § 12–1175 (A) specifies how a forcible detainer action commences. To proceed, the claimant must allege (1)

[6] Affidavit of Service dated November 23, 2010, indicating service was done on November 22, 2010 at 3:37 P.M.
[7] Audio Recording of January 19, 2011, hearing, at 11:04.
[8] Ruling on Defendant's Motion to Vacate signed January 19, 2011.

he or she has the right to actual possession; and (2) he or she demanded possession of the premises in writing before filing the action. Both conditions must be met or the action would be premature. A.R.S. § 33–1368 (B).

A.R.S. § 33–1368 provides a landlord with the procedure for obtaining relief if the tenant fails to pay rent in a timely manner. The landlord may terminate the rental agreement if the tenant fails to pay rent within five days after written notice by the landlord of (1) nonpayment and of (2) the landlord's intent to terminate the rental agreement if the rent in not paid within that time period. Thus, this statute requires the landlord to give the tenant written notice of the landlord's intent to terminate the rental agreement before filing the forcible detainer action. Written notice gives the tenant the opportunity to cure the defect before the summary proceeding is instituted. In this case, the parties do not dispute the need for service of the forcible detainer complaint. Instead, the parties argue about whether the notice required prior to a forcible detainer action must be served according to either rule 5(f) RPEA or rule 4 ARCP. The crux of this case is if the landlord is required to serve this 5 day notice or merely provide notice to the tenant.

Service of documents in both forcible detainer and civil actions are governed by specific rules. In a forcible detainer action, Rule 5(f) RPEA details the requirements. In a civil action, Rule 4.1 or 4.2 ARCP mandates how service must occur. Rule 5(f) of the RPEA states:

> Service of the summons and complaint shall be accomplished by either personal service or post and mail service for a special detainer action, as provided by Rule 4.1 or 4.2 of the Arizona Rules of Civil Procedure. Service of process shall only be performed by a person authorized to do so under Rule 4(D) of the Arizona Rules of Civil Procedure. Return of service and proof thereof shall be made by affidavit.

ARCP Rules 4.1 and 4.2 provide for personal service or service by mail. Failure to comply with the requirements of these rules results in consequences. RPEA, Rule 5(g) details the consequences for failing to obtain proper service.

In this action, the parties agree Plaintiff failed to properly serve Defendant with the 5 day notice. Although Plaintiff hired a process server, the process server, perhaps through inadvertence, failed to serve Defendant[9] and, instead, served an unidentified red-haired Caucasian male who is only identified on the affidavit of service as William. This failure is only material if Plaintiff was required to serve the 5 day notice. Defendant does not dispute his receipt of the 5-day notice. In fact, Defendant received the written notice of the landlord's intent to terminate the rental agreement when he found the 5 day notice posted on his door on November 9, 2010. His receipt of the written notice occurred just one day after the "service" occurred. Thus, if the statute only requires written notice to the tenant, the Plaintiff should prevail. If, on

[9] Although Plaintiff took appropriate steps to try to ensure proper service, the record in this case demonstrates Plaintiff did not serve Defendant.

the other hand, the statute requires service, Plaintiff clearly fails to meet the burden of showing proper service occurred.

Neither party adequately addressed the difference between notice and service in this context at the January 19, 2011, hearing. According to Black's Law Dictionary (9th ed. 2009) notice is "legal notification required by law." A person has notice under the following circumstances:

> A person has notice of a fact or condition if that person (1) has actual notice of it; (2) has received information about it; (3) has reason to know about it; (4) knows about a related fact; or (5) is considered as having been able to ascertain it by checking an official filing or recording.

Black's Law Dictionary, *id*. A.R.S. § 33–1313 (A) re Notice adopts many of these criteria and states:

> A person has notice of a fact if he has actual knowledge of it, has received a notice or notification of it or from all the facts and circumstances known to him at the time in question he has reason to know it exists. A person "knows" or "has knowledge" of a fact if he has actual knowledge of it.

While A.R.S. § 33–1313 (B) also provides for notice to a tenant by personally delivering the notice, or mailing it by registered or certified mail, this section of the statute is written in the disjunctive.

> A person "notifies" or "gives" a notice or notification to another by taking steps reasonably calculated to inform the other in ordinary course whether or not the other actually comes to know of it. A person "receives" a notice or notification when it comes to his attention, or in the case of a landlord, it is delivered in hand or mailed by registered or certified mail to the place of business of the landlord through which the rental agreement was made or at any place held out by him. . . or, in the case of the tenant, it is delivered in hand to the tenant or mailed by registered or certified mail to him at the place held out by him as the place for receipt of the communication or, in the absence of such designation, to his last known place of residence.

The word "or" is a disjunctive particle. It is used to give a choice or express an alternative. *State v. Pinto*, 179 Ariz. 593, 595, 880 P.2d 1139, 1141 (Ct. App. 1994). Under the wording of this section, Defendant received notice when it came to his attention. According to Defendant's own testimony, this occurred on November 9, 2010. Defendant then had the statutorily allowed 5 days in which to cure his non-payment of rent. Plaintiff did not file his forcible detainer action until November 19, 2010, a period in excess of the 5 day minimum requirement.

. . . .

Service is "the formal delivery of a writ, summons, or other legal process." Black's Law Dictionary, *id*. The terms "notice" and "service" have specific meanings and are not used interchangeably in our statutory scheme.[10] The legislature did not use the term "service" in connection with the statute requiring a 5 day notice. It did, however, require service, once a forcible detainer action is begun. Clearly, then, our legislature did not intend to mandate service of the 5-day notice. "The legislature is presumed to express its meaning as clearly as possible and therefore words used in a statute are to be accorded their obvious and natural meaning" *Deatherage v. Deatherage*, 140 Ariz. 317, 320, 681 P.2d 469, 472 (Ct. App. 1984). Because the statutes do not require service of the 5 day notice, the trial court erred when it imposed this obligation on Plaintiff. The testimony presented to the trial court indicated Defendant received the 5 day notice on November 9, 2010. Plaintiff did not file his forcible detainer action until November 19, more than 5 days from the date when Defendant received the 5 day notice.

B. Did the Trial Court Abuse Its Discretion in Granting Defendant's Motion to Vacate the Default Judgment.

In reviewing a case for an abuse of discretion, the appellate court must determine if the question is one of fact or law. The appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier-of-fact. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2 1185, 1189 (1989). However, if the facts are not in dispute, the appellate court must resolve the legal question. The Arizona Supreme Court addressed the distinction between discretionary facts and law.

> Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers, and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to "look over the shoulder" of the trial judge and, if appropriate, substitute our judgment for his or hers.

[10] A.R.S. § 33–341 re termination of tenancies requires notice. A.R.S. § 12–1173 re definition of forcible detainer requires a written demand while A.R.S. § 33–1368 (B) re Noncompliance with rental agreement by tenant requires the landlord to deliver written notice to the tenant if rent is unpaid. This statute provides the landlord with the opportunity to terminate the rental agreement by filing a forcible detainer action pursuant to A.R.S. § 33–1377. In contrast, A.R.S. § 33–1377—re special detainer actions—requires service of the action.

State v. Chapple, 135 Ariz. 281, 297 n. 18, 660 P.2d 1208, 1224 n.18 (1983) (citation omitted). In this case, Defendant agrees he actually received the 5 day notice. Both parties also agree the process server did not serve Defendant with the 5 day notice, but, instead, delivered the 5 day notice to another individual. Because the issue in the present case does not require an "assessment of conflicting procedural, factual or equitable considerations which vary from case to case" but does involve a "question . . . of law or logic," it is appropriate for this court to substitute its judgment for that of the trial court.

The trial court referenced both procedural due process and the need for a global settlement in deciding to vacate Plaintiff's default judgment. This court finds the trial court's ruling to be incorrect. The trial judge's ruling stated "The purpose of process is to provide effective notice to defendant." As discussed in the preceding section, this court finds the statutory requirements do not include a mandate that the 5 day notice be served. Instead, this court finds that Plaintiff met its notice requirement when Defendant actually received the posted 5 day notice on November 9, 2010. Because the trial court ruled about service of process rather than notice, the trial court misconstrued the legal issue. Consequently, this Court finds the trial court erred in concluding due process required service of the 5 day notice.

Finally, the Court further finds the trial court erred in ruling on the basis of a global settlement. At the beginning of the hearing, the trial court instructed the parties about the hearing and limited the issues to those involved in the Motion to Vacate the forcible detainer judgment. In ruling on issues that were not presented to the trial court, the trial court overstepped its authority.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Highland Justice Court erred in granting Defendant's Motion to Vacate the default judgment.

IT IS THEREFORE ORDERED reversing the judgment of the Highland Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Highland Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court

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